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No. 78-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

SUPPLEMENTAL BRIEF IN OPPOSITION TO ARKANSAS LOUISIANA GAS COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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April 1979

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PRELIMINARY STATEMENT

At the time ARKANSAS LOUISIANA GAS COMPANY ("Arkla") filed its petition for a writ of certiorari with this Court on December 18, 1978 seeking a review of the factual findings, contractual determinations and damage judgments of the Louisiana district court and the Louisiana court of appeals below, the instant lawsuit involving Respondents' substantive contractual rights and claims for the judicial recovery of compensatory damages and monetary reparations for the actual losses and damages sustained and incurred as a

direct result of Arkla's continued breach and violation of Respondents' private contractual rights for fourteen years and Arkla's wrongful obstruction and prevention of the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years had not been finally decided by the Louisiana Supreme Court, but rather was still pending before the Louisiana Supreme Court for a final judgment. On March 5, 1979, the Louisiana Supreme Court in the case of "*Frank J. Hall, et al.* v. *Arkansas Louisiana Gas Company,* Docket No. 62,560, Supreme Court of Louisiana" by applying well established rules and principles of contract law, equity and justice to the factual determinations as made by that court in light of the overwhelming evidence in this case rendered a final judgment with respect to the legal merits of Respondents' substantive contractual rights under state law to recover monetary damages and reparations in compensation for the actual losses and damages caused by Arkla's continued breach of contract and Arkla's effective withholding and concealment of all of the true facts from Respondents for fourteen years which as found by the Louisiana Supreme Court wrongfully and improperly obstructed, prevented and precluded the timely implementation and prospective fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.[1]

[1] A copy of the Louisiana Supreme Court's final judgment dated March 5, 1979 is attached hereto for the Court's ready reference and review. (Appendix I—pp. 26a-42a) On April 9, 1979 the Louisiana Supreme Court unanimously denied Arkla's "Application For a Rehearing" wherein Arkla had again vigorously challenged and contested the factual findings and contractual determinations of the Louisiana Supreme Court in this case. A copy of the Louisiana Supreme Court's order denying Arkla's "Application For a Rehearing" is attached hereto for this Court's ready reference and review. (App J—p. 43a).

On March 29, 1979, Respondents were served by mail with a copy of Arkla's "Supplemental Brief Addressing Decision of Louisiana Supreme Court" as filed with this Court in this proceeding and in which Arkla purports to address, analyze and dispute the factual findings and contractual determinations as made by the Louisiana Supreme Court in this case. In that Arkla as the wrongdoer has in this proceeding for obvious and self-serving reasons completely misconceived, distorted and obscured the true factual and contractual determinations that were properly made by the Louisiana Supreme Court in this case on March 5, 1979, Respondents feel compelled to answer and correct Arkla's unwarranted, erroneous and wholly self-serving representations and conclusions.

Moreover, Respondents submit that notwithstanding Arkla's erroneous and self-serving contentions a fair, impartial and objective reading and analysis of the Louisiana Supreme Court's final judgment in this case clearly confirms that Arkla as Respondents' contractual obligor wrongfully injured and damaged Respondents from 1961 through 1975 by continuously breaching and violating their private contractual rights and by improperly obstructing, preventing and precluding the timely and prospective implementation and fulfillment of their private contractual rights in a manner fully consistent with the true intent of the contract and all applicable laws, rules and regulations

in the same wrongful manner and improper extent that numerous other fair and impartial courts have also properly determined and held that Cities Service Gas Company, Gulf Oil Corporation, Kerr-McGee Corporation and Louisiana-Nevada Transit Company as similarly situated contractual obligors have likewise wrongfully injured and damaged other similarly situated contractual obligees by breaching and violating similar private gas sales contracts. See: *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); and *Louisiana-Nevada Transit Co.* v. *Woods*, 393 F. Supp. 177 (W.D. Ark. 1975).

Contrary to Arkla's contentions, just as the fair and impartial courts in the above cited cases legally protected and properly compensated the similarly situated innocent, injured and aggrieved parties against their actual losses and damages by applying well established rules and principles of contract law, equity and justice to the true facts as established in those cases, the Louisiana Supreme Court after five years of litigation in the instant case applied those same well established rules and principles of contract law, equity and justice to the true facts as established in this case and, thus, legally protected and properly compensated Respondents against the actual losses, damages and injuries which they have wrongfully sustained and incurred for fourteen years because Arkla as their contractual obligor in its own corporate self-interest elected to continuously breach and violate their private

legal and contractual rights and to effectively misrepresent and withhold all of the true, relevant and material facts from Respondents for fourteen years. While Arkla is obviously angry and upset over the fact that it after fourteen years finally got caught breaching and violating Respondents' private contractual rights and that the Louisiana Supreme Court has now properly fixed and determined its independent contractual liability in compensatory damages and monetary reparations for the actual losses and damages that it has caused Respondents to sustain and incur for fourteen years, Arkla's anger and corporate desire to evade and escape its contractual liabilities in compensatory damages does not excuse its obvious and bombastic efforts to totally distort and obscure the real factual findings and contractual determinations as now finally made by the Louisiana Supreme Court in this case after five years of active, extended and protracted litigation. Contrary to Arkla's inaccurate and erroneous contentions, fair and proper analysis confirms that the judgment of the Louisiana Supreme Court in this case does justice to the injured and damaged Respondents and at the same time does *not* involve, affect or undermine the Federal Power Commission's or the Federal Energy Regulatory Commission's regulatory responsibility under the Natural Gas Act to protect consumers from excessive prices for dry or residue gas as sold in interstate commerce. Arkla as the wrongdoer is in this proceeding obviously and desperately seeking to protect and preserve its own private fisc and corporate interest, *not* the public interest which is clearly not at stake in this case, at Respondents' loss, damage, detriment and expense.

Respondents submit that in the interest of correctness, comity, judicial economy and justice Arkla's

pending petition for a writ of certiorari should not be decided based upon Arkla's erroneous analysis of the factual evidence and self-serving misconceptions as to the contractual remedy and substantive law upon which the Louisiana Supreme Court ultimately relied in awarding Respondents compensatory damages and monetary reparations for their actual losses and injuries caused and sustained due to Arkla's wrongful and continued breach of contract in the instant case. Moreover, Respondents submit that under established rules of comity and appellate review this Court should in connection with its review of the conflicting allegations contained in Arkla's petition for a writ of certiorari and supplemental briefs fully consider and have the benefit of the final judgment as rendered by the Louisiana Supreme Court in this case which completely contradicts and refutes the erroneous and self-serving contentions as made by Arkla in this proceeding. Further, Respondents respectfully submit that under established rules of comity, appellate procedure and review this Court should in reviewing the inaccurate and unsupported allegations in Arkla's petition and briefs accord the final judgment of the Louisiana Supreme Court in this case its proper deference, respect, weight and dignity with regard to the specific factual findings and contractual determinations as made by the Louisiana Supreme Court by applying well established rules and principles of contract law, equity and justice to the true and established facts in this case.

I. The Decision of the Louisiana Supreme Court

After a United States district court by virtue of a "Judgment of Remand" dated February 2, 1976 [2] and the Federal Power Commission by means of four separate orders issued from March 8, 1976 through January 11, 1977 [3] in light of the applicable and controlling decisions of this Court properly, consistently and correctly remanded and deferred the factual and contractual issues as presented in the subject contractual and damage dispute between Arkla and Respondents to the Louisiana courts for resolution and adjudication, the Louisiana Supreme Court and the other courts below in order to resolve and adjudicate the factual and contractual issues as presented in this case had to and did by applying well established rules and principles of contract law to the factual evidence in this case make certain factual findings and contractual determinations with respect to the true intent of the parties to the subject January 11, 1952, gas sales contract. The Louisiana courts below by applying ordinary rules and principles of contract law to their factual findings in this case have now after five years of burdensome, extended and protracted litigation unanimously determined and held that it was the "true intent" of the parties to this specific contract for the subject favored nations clause to cover, include and apply to Arkla's

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[2] See: *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, CA 75-1168, wherein the United States District Court pursuant to 28 U.S.C. 1447(c) and (d) correctly remanded this case to the Louisiana courts for resolution and adjudication.

[3] See: *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI76-28, wherein the Commission correctly, properly and consistently denied Arkla's "Petition For a Declaratory Order" and deferred this case to the Louisiana courts for resolution and adjudication.

contractual agreements with the United States Government under which and pursuant to which Arkla in its dual capacity as a pipeline purchaser and the owner and operator of a pipeline system in the Sligo Field, Bossier Parish, Louisiana actually paid higher prices to the United States Government for the Government's share of the dry or residue royalty gas, liquefiable hydrocarbons, gasoline and extracted plant products as produced from the same Sligo Gas Field during the same period of time and delivered into Arkla's same Sligo pipeline system and gas processing plant by means of monthly checks drawn and issued on its same "Gas Purchase Account" from September, 1961 through December, 1975. The Louisiana Supreme Court and the other courts below by applying well established rules of ordinary contract law to the true facts as established by the evidence in this case properly determined and confirmed the true intent of the parties to the subject contract and clearly the courts' interpretation of this private gas sales contract to determine the true intent of the parties when they perfected this contract on January 11, 1952 did *not* present or involve any real or substantial federal questions.

Contrary to Arkla's erroneous contentions in this proceeding, the Louisiana courts' unanimous determination and adjudication of the "true intent" of the parties when they perfected and executed the subject private contract on January 11, 1952 as a matter of ordinary contract law is entirely consistent with the overwhelming factual evidence in the case and other decided cases involving similar factual situations and similar private gas sales contracts. See: *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971), and *Louisiana-Nevada Transit Co.* v. *Woods*,

393 F.Supp. 177 (W.D.Ark. 1975). Moreover, an unanimously determined by all of the Louisiana courts below the parties to the subject private 1952 gas sales contract did *not* "intend" as Arkla now contends to restrict or endow the meaning and scope of the terms "purchase at higher prices from another seller" as contained in their private contract with the statutory meaning and scope of the term "sale" as used by Congress in the Natural Gas Act to describe "sales for resale in interstate commerce". See: *Skelly Oil Co., et al* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) where this Court correctly observed and concluded that:

> "Even though the language of the contract may be identic with that of § 7(c), this language in the contract may have a scope independent of the proper construction of § 7(c). The same words, in different settings, may not mean the same thing... Parties do not necessarily endow statutory language in a contract with the scope of the statute, particularly when the same term may have variant meanings for different applications of the statute. See Standard Oil Company v. Johnson, 316 US 481, 483, 86 L ed 1611, 1614, 62 S Ct 1168....
>
> If Phillips sought damages from petitioner or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts."

Clearly Arkla's total reliance upon the case of *Mobil Oil* v. *F.P.C.*, 463 F.2d 256 (D.C. Cir. 1971), which is neither factually nor legally applicable to the specific factual situation and contractual issues involved in the instant case, as determinative of the "true intent" of

the parties when they perfected their private contract on January 11, 1952 is completely misplaced and was properly rejected by all of the courts below. Arkla's misplaced reliance upon the *Mobil* case as decided in 1971 as having any bearing upon the "true intent" of the parties to the subject private gas sales contract when they perfected same on January 11, 1952 is further confirmed by the recent decisions of the F.E.R.C. and the Courts in *The Matter of Louisiana Land and Exploration Company* v. *Federal Energy Regulatory Commission,* 574 F.2d 204 (5th Cir. 1978), cert. den. —— U.S. —— (Docket No. 78-687) on January 22, 1979. These decisions inescapably demonstrate that the term "sale" as used by Congress in the Natural Gas Act has "variant meanings" for different factual situations.

The F.E.R.C. when faced with a factual situation similar to that presented in this case with respect to the "economic realities" of the contractual arrangements between Arkla in its dual capacity as a lessee-pipeline purchaser and the United States Government as a landowner that also controlled and determined the prices that it would receive in exchange for its share of the royalty gas as delivered and sold to Arkla properly concluded and held that a "letter contract" between Louisiana Land and Exploration Company ("Land"), as the landowner-royalty owner-seller, and Tennessee Gas Transmission Company ("Tennessee"), as the lessee-pipeline purchaser, constituted a "sale" of Land's royalty gas to Tennessee, which like Arkla in the instant case occupied the dual position as a lessee-pipeline purchaser, within the meaning and intent of the term "sale" as used by Congress in the Natural

Gas Act. The Commission correctly ignored and disregarded the labels ("royalty settlement") that were used to describe Tennessee's receipt of and payment for Land's royalty gas as delivered into its interstate pipeline system and looked at the "economic realities" of the "contractual arrangement" and the actual "transactions" to determine if there had been a "sale" of Land's royalty gas to Tennessee. The Commission in resolving the dispute ultimately found that Land as the landowner-lessor, just like the United States Government in this case, controlled the "incidents" of the sale of its royalty gas to Tennessee as its lessee-pipeline purchaser by fixing and determining the "price" per Mcf that Tennessee would pay to Land in exchange for its royalty gas as delivered into Tennessee's interstate pipeline system. Thus, the Commission held that in light of "economic realities" and Land's control of the "incidents" of the sale under the March 14, 1960 "letter contract" there was a "sale" of Land's royalty gas to Tennessee and that since Land's royalty gas was delivered into an interstate pipeline system there was a "sale for resale" as intended by Congress under the Natural Gas Act. The United States Court of Appeals for the Fifth Circuit in affirming the F.E.R.C.'s decision held that:

> "FERC reasoned that '[t]he result . . . that Amoco is selling part of the gas to Tennessee for 21 cents per Mcf while Land . . . is receiving 25 cents for another part of the gas . . . economically is a sale' and concluded that 'the kind of transaction here developed between Land . . . and Tennessee does not represent a royalty transaction but a sale of natural gas in interstate commerce subject to the jurisdiction of the Commission.' . . .
>
> Although Land would have us conclude that because it owns no gas it could never have made a

sale of gas in interstate commerce, an analysis of relevant authorities leads us to a less mechanical interpretation of the Act. . .

. . . a restrictive definition of 'the sale in interstate commerce of natural gas . . .' is inappropriate if it ignores economic realities.

This conclusion draws additional support from the reasoning of the court in Mobil Oil Corp. v. FPC, . . The court in Mobil reversed a FERC order declaring that when a landowner executes an oil and gas lease providing royalties to be measured by proceeds or value of extracted gas, ' "he has contracted to retain an economic interest in interstate sales by the producer," and "has joined the other interest owners in such sales and he has become a seller of natural gas," ' . . In reversing the FERC decision, the court reasoned that an economic interest in the proceeds of a sale, unaccompanied by authority to determine the incidents of the sale, does not make the interest owner a seller within the Natural Gas Act. Thus, the Mobil opinion anticipates the facts of this case and supports our conclusion that economic realities and not labels determine whether a jurisdictional sale has occurred. . . .

Moreover, the exercise of the power, coupled as it was with an alteration of the royalty rate, had the effect of altering not only the cost of extracting the gas but also the cost of introducing the gas to commerce. Under these circumstances, we conclude that in economic effect Land sold gas in interstate commerce subject to FERC jurisdiction. We hold that by retaining a royalty interest in gas extracted from premises leased to Amoco, retaining power to prevent Amoco from selling its entire interest in proven and developed reserves to a pipeline company, and agreeing to an amendment of the terms of the royalty payments before consenting to the jurisdictional transfer, Land made a jurisdictional sale of natural gas."

Arkla for obvious reasons has selectively failed to cite or discuss the *Louisiana Land case, supra,* which clearly demonstrates that *Mobil* is *not* "paramount federal law"; and even if it was definitive as to the meaning of the term "sale" as contained in the Natural Gas Act for all factual situations, which it clearly is not, *Mobil* is totally irrelevant and inapplicable as to the lower courts' determination in this case of the true intent of the parties to the subject private gas sales contract when they perfected same on January 11, 1952.

Arkla in this proceeding for obvious reasons seeks to completely ignore and disregard its dual capacity as a lessee-pipeline purchaser in its "contractual agreements" with the United States Government and the "economic realities" of the financial transactions wherein the United States Government has controlled and determined the "prices" which Arkla as a pipeline purchaser has had to pay for the United States Government's share of the royalty gas as produced from the Sligo Gas Field and delivered into Arkla's Sligo gas pipeline system from 1961 through 1975. Contrary to Arkla's representations in this proceeding, all of the courts below correctly determined in light of the evidence and the sworn testimony of Arkla's own officers and officials that Arkla in its dual capacity as a pipeline purchaser fully complied with its contractual obligations to the United States Government under Section 2(n) of Arkla's 1961 contract with the United States Government which expressly provided that:

> "Lessee agrees: If owner, or operator, or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil or gas derived from

lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products obtained under a lease or permit granted by the United States."

Additionally, the courts below unanimously and correctly found that Arkla in its dual capacity as a pipeline purchaser fully complied with its November 15, 1962 letter contract with the United States Government which expressly provided that:

> "By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of $0.117432 per mcf until January 1, 1962; $0.130252 until January 1, 1967 and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for Arkansas Louisiana Gas Company's share of the gas at the above figures."

Arkla in this proceeding further ignores the fact that the United States Government consistent with its contractual rights exercised control over the "incidents" of the sale of its royalty gas to Arkla and that Arkla "paid" the agreed upon "prices" for the United States Government's royalty gas as delivered into its Sligo gas pipeline system by means of monthly checks drawn and issued on its "Gas Purchase Account" from 1961 through 1975. Based upon the specific "terms" as

contained in Arkla's contracts with the United States Government and the "economic realities" of the transactions by which Arkla received and paid for the Government's royalty gas as delivered into its Sligo pipeline system, all of the Louisiana courts below have properly and correctly determined and held that Arkla's payment of "higher prices" pursuant to Arkla's "contractual agreements" with the United States Government for the Government's royalty gas as produced from the same Sligo Gas Field from 1961 through 1975 constituted "the payment of a higher price to another seller" within the true meaning and intent of the parties who perfected the subject private gas sales contract on January 11, 1952. The courts in this case had to and did determine the true intent of the parties who perfected this private contract on January 11, 1952, *not* the intent of Congress in using certain terms in a federal statute, which terms clearly have "variant meanings" under different factual situations.

The Louisiana Supreme Court after reviewing and considering the 4,987 pages of sworn testimony and the 454 items of documentary evidence as adduced at the trial of this case and by applying well established rules of contract law to the facts of this case determined and decreed that Arkla continuously breached and violated its affirmative contractual duties and obligations to the Respondents herein for fourteen years by failing to timely, properly, cooperatively and in good faith honor, perform and fulfill Respondents' private contractual rights in a manner consistent with the true intent of the parties and all applicable laws, rules and regulations for fourteen years. Moreover, the Louisiana Supreme Court by applying well established rules of contract law to the evidence in this

case determined and decreed that Arkla wrongfully injured and damaged the Respondents herein for fourteen years by improperly obstructing, preventing and precluding the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.[4] Further, the Louisiana Supreme Court by applying well established rules of contract law to the facts of this case has determined and decreed that the Respondents herein are entitled to recover monetary damages and reparations in compensation for the actual losses and damages sustained and incurred by Respondents because Arkla as their contractual obligor continuously breached and violated their contractual rights and effectively prevented the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.

The substantive rules and principles of contract law, equity and justice as applied to the facts of this case by the Louisiana Supreme Court are:

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[4] Arkla's own "Internal Memorandums" (Respondents' Appendix B, C, D and E) evidence and confirm the fact that Arkla as early as the fall of 1961 was cautioned and warned by its *own* officers and officials about the potential "problem" and "additional costs" that it could incur under the "favored nations clause" in its 1952 contract with Respondents if it paid "higher prices" for the United States Government's royalty gas as produced from the same Sligo Gas Field, Bossier Parish, Louisiana. Arkla's *own* "Internal Memorandum" dated January 17, 1974 (Respondents' Appendix E) confirms that Arkla "deliberately" elected to continue to withhold and conceal from Respondents all of the true, relevant and material facts concerning its continued breach and violation of Respondents' private contractual rights.

(a) "In the absence of an express provision therefore, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made. Moreover, in every contract there exists an implied covenant of good faith and fair dealing; and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract....

It is implied in every contract that there is a duty of co-operation on the part of both parties."

See: *Corpus Juris Secundum,* 17A, Contracts, § 328 pp. 284-287, and Notes 40.5 and 41.

(b) "Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents, hinders, or renders impossible, the fulfillment of a condition precedent or its performance by the adverse party, or is himself the cause of failure to perform the condition, he cannot rely on such condition to defeat his liability. A party who prevents the fulfillment of a condition of his own obligation commits a breach of contract; and a party whose misconduct has rendered it futile, as a practical matter, for the other party to fulfill a condition cannot complain of his failure to do so."

See: *Corpus Juris Secundum,* 17A, Contracts, § 468(b) pp. 645-646.

(c) "'The party who is prevented by the other party from performing, or whose performance is made impossible by him, may treat the contract as broken or breached, or as repudiated, or rescinded, and may recover whatever damages he may have sustained, . . .'"

See: *Corpus Juris Secundum,* 17A, Contracts, §469 p.647;

Restatement of Contracts, § 302 (1932);

3A Corbin, Contracts, § 748 (1960);

5 Williston, Contracts, §§ 670, 677 (3d ed. 1961);

11 Williston on Contracts, §§ 1296, 1316 (3d ed. 1968); and

3 Corbin, Contracts, § 568, pp. 331-334 (1960).

(d) "The measure of damages for a breach of contract is substantive law. In the case of a breach of contract the measure of damages is an amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed."

See, *Corpus Juris Secundum,* 25, Damages, § 74 p. 843.

(e) "The primary aim in measuring damages is compensation, and this contemplates that compensatory damages for a breach of contract should place the injured party in the same position he would be in if the contract had been fulfilled, or to place the injured party in the same position he would have occupied if the breach of contract had not occurred."

See: *3 Williston on 'Sales',* § 599, p. 293;

McCormick on Damages, § 137, p. 560;

Corbin on Contracts, §§ 1029 and 1088;

Summers, The Law of Oil & Gas, §§ 434 and 435; and

Restatement of the Law of Contracts, § 329.

The above and foregoing substantive rules and principles of contract law, equity and justice were correctly and properly applied by the Louisiana Supreme Court to true and actual facts in this case in order to justly compensate and protect Respondents against the actual losses as caused by Arkla's breach of contract and continued misconduct from 1961 through 1975 in the same manner that this Court and all other courts of this Nation have likewise properly and consistently applied and enforced the same well established rules and principles of contract law, equity and justice to protect similarly injured and aggrieved parties against similar losses and damages caused by the breach and violation of contractual obligations, to wit:

(a) *United States* v. *Peck,* 102 U.S. 64 (1880):

". . . the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison, Cont., sec. 326; Fleming v. Gilbert, 3 Johns., 527 . . . 'It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.'."

(b) *Deitrick* v. *Greaney,* 309 U.S. 190 (1940):

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See United States v. Dunn, 268 US 121, 133, 69 L ed 876, 882, 45

S Ct 451; Independent Coal & Coke Co. v. United States, 274 US 640, 648, 71 L ed 1270, 1278, 47 S Ct 714."

(c) *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975):

"And where a legal injury is of an economic character,

'[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867)."

(d) *Story Parchment Co.* v. *Paterson P. Paper Co.,* 282 U.S. 555 (1931):

"As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. . .

'. . . And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.'."

See also: *State of Louisiana* v. *F.P.C.,* 503 F.2d 844 (5th Cir. 1974); *Monsanto Co.* v. *F.P.C.,* 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co.* v. *F.P.C.,* 476 F.2d 121 (5th Cir. 1973); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir. 1960); *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *FPC,* 535 F.2d 1278 (D.C. Cir. 1976); *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359 (1926); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.,* 447 F.2d 569 (7th Cir. 1971); *Louisiana-Nevada Transit Co.* v. *Woods,* 393 F. Supp. 177 (W.D. Ark. 1975); *Atlas Trading Corp.* v. *S. H. Grossman, Inc.,* 169 F.2d 240 (3d Cir. 1948); *Vanadium Corp. of America* v. *Fidelity and Deposit Co.,* 159 F.2d 105 (2d Cir. 1947); *Watson Bros. Transportation Co.* v. *Jaffa,* 143 F.2d 340 (8th Cir. 1944); *Rochester Park, Inc.* v. *City of Rochester,* 238 N.Y.S.2d 822 (1963), aff'd, 241 N.Y.S. 2d 763; *Lennon* v. *Habit,* 216 N.C. 141, 4 S.E.2d 339 (1939); *George W. Garig Transfer, Inc.* v. *Harris,* 226 La. 117, 75 So.2d 28 (1954); *Gridiron Steel Co.* v. *Jones & Laughlin Steel Corp.,* 361 F.2d 791 (6th Cir. 1966); *Peter Kiewit Sons' Co.* v. *Summit Construction Co.,* 422 F.2d 242 (8th Cir. 1969); *Ballard* v. *El Dorado Tire Co.,* 512 F.2d 901 (5th Cir. 1975); *Ammerman* v. *Miller,* 488 F.2d 1285 (D.C. Cir. 1973); and *Christensen* v. *Felton,* 322 F.2d 323 (9th Cir. 1963).

In the final analysis the Louisiana Supreme Court has in light of the true and actual facts of this case and well established rules and principles of law, equity and justice properly compensated and protected Respondents against the actual losses and damages that they have sustained and incurred due to Arkla's continued breach of contract and wrongful misconduct for fourteen years in the same proper and just manner that all of the Courts properly protected and compensated Western Natural Gas Company by an award of compensatory damages in the sum of $5,026,000.00 for the actual losses caused by Cities Service Gas Company's breach and violation of a 1949 private gas sales contract that covered the sale of natural gas in interstate

commerce and was filed with the F.P.C. as part of a rate schedule under the Natural Gas Act. See: *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972) and *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976). Certainly, the Respondents herein under the facts of this case and the same well established rules and principles of contract law, equity and justice are legally entitled to the same measure of justice and equal protection of the law from the wrongful losses and damages caused by Arkla's continued breach and violation of their contractual rights as was the Western Natural Gas Company in the above cited cases. Moreover, careful analysis will reveal that Arkla has in this proceeding done nothing more than to readopt, rephrase, reuse and reassert the same erroneous and unjust theories and contentions that were unsuccessfully used and employed by Cities Service Gas Company to attempt to escape and evade its legal and contractual liabilities in compensatory damages and monetary reparations for the actual losses and damages caused by virtue of its continued breach and violation of a similar 1949 private gas sales contract.

II. The Regulatory Responsibilities of the F.P.C. and F.E.R.C. Under the Natural Gas Act to Protect Consumers From Excessive Prices for Natural Gas Sold in Interstate Commerce Were Not Involvd or Affected in This Case.

Contrary to Arkla's erroneous and inflammatory contentions in this proceeding, this Court and accordingly numerous other courts of this Nation have repeatedly held that the Natural Gas Act, as enacted by Congress in 1938 to protect consumers from "excessive prices" for residue natural gas as sold in interstate commerce,

recognized the continued need for private gas sales contracts of varying terms and was fully intended by Congress to preserve the integrity of private gas sales contracts and the fundamental contractual rights of injured parties to judicially recover compensatory damages and monetary reparations for actual losses and injuries caused and sustained by the breach and violation of private gas sales contracts. See: *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 399 U.S. 667 (1950); *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956): *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961); *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *State of Louisiana* v. *F.P.C.*, 503 F.2d 844 (5th Cir. 1974); *Monsanto Co.* v. *F.P.C.*, 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co.* v. *F.P.C.*, 476 F.2d 121 (5th Cir. 1973); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *City of New Orleans* v. *United Gas Pipe Line Co.*, 390 F.Supp. 861 (E.D. La. 1974); and *Skelly Oil Co.* v. *F.P.C.*, 532 F.2d 177, 179 (10th Cir. 1976).

Arkla in this proceeding has simply disregarded the above cited cases and the fact that the Respondents' judicial recovery of compensatory damages for their actual losses and injuries in this case is completely compatible and consistent with the regulatory purposes of the Natural Gas Act to protect consumers from excessive prices for dry or resique natural gas as sold in interstate commerce. First, Arka ignores the fact that the F.P.C. pursuant to the Natural Gas Act many years ago in the exercise of its regulatory responsibility to protect consumers against excessive prices for residual

natural gas sold in interstate commerce determined and decreed that "favored nations clauses" as contained in private gas sales contract perfected prior to April 3, 1961 are consistent with the public interest and, thus, are valid and enforceable as a matter of contract law up to the Commission's established and approved maximum, lawful, just and reasonable area rate ceilings. The F.P.C. also has determined that private gas sales contracts perfected on or after April 3, 1961 may not contain "favored nations clauses". See: 18 C.F.R. 154.93. In that the subject private gas sales contract between Arkla and the Respondents herein was perfected on January 11, 1952, the favored nations clause as contained in this private contract was and is under the Commission's own rules and regulations (18 C.F.R. 154.93) a valid and enforceable contractual obligation which as a matter of private contract law could and should have been timely and cooperatively honored, performed and fulfilled by Arkla from 1961 through 1975 in a manner consistent with all applicable F.P.C. rules and regulations and the relevant public interest against excessive prices for residue gas as sold in interstate commerce.

Secondly, Arkla in this proceeding further ignores and totally disregards the fact that the F.P.C. in carrying out its regulatory responsibilities to protect consumers against excessive prices for dry or residue natural gas as sold in interstate commerce from 1961 through 1975 has by means of its *"Statement of General Policy No. 61-1"* (24 FPC 818) and *"Other Southwest Area Rate Order No. 607 and 607-A"* (18 C.F.R. §§ 154.109 and 154.109a) heretofore determined, fixed, established and approved the maximum lawful, just and reasonable area rate ceilings up to which the Respondents herein could and should have received as contractually authorized for their dry or residue gas as sold to Arkla under the subject contract from 1961 through 1975 *had* Arkla timely honored the contract and prospectively cooperated with Respondents as it was contractually obligated to do under well established and unimpeachable rules and principles of contract law, equity and justice.

Thus, it is clear that the F.P.C. in protecting the public interest from excessive prices for dry or residue natural gas as sold in interstate commerce under the subject contract many years ago determined that it would have been in accordance with the public interest and consistent with the public interest for Respondents to receive their contractually authorized prices for their dry or residue gas up to the maximum, lawful, just and reasonable area rate ceilings, which from 1961 through 1975 ranged from $0.14 per Mcf to $0.206 per Mcf. Prior to the time the Respondents herein became certified as "small producers" by the F.P.C. in 1972, Respondents received approximately $0.08 per Mcf to $0.11 per Mcf for their dry or residue gas as sold to Arkla under the subject contract, when in fact and in law, as unanimously determined by all of the Louisiana courts, Respondents were contractually authorized and entitled to receive $0.117 per Mcf to $0.14 per Mcf for their dry or residue gas as sold to Arkla under the subject private gas sales contract. These contractually authorized prices which Respondents did not receive due to Arkla's continued breach of contract for fourteen years were without question consistently and substantially *below* the Commission's applicable maximum, lawful, just and reasonable area rate ceilings. Thirdly, Arkla in this proceeding also fails to mention

and completely ignores the fact that the contractually authorized prices which Respondents could and should have received for their liquefiable hydrocarbons, gasoline and extracted plant products as sold to Arkla from 1961 through 1975 under the subject contract, but did not receive from Arkla because of its continued breach of contract and successful withholding of the true facts from Respondents for fourteen years, have never been limited or restricted by the F.P.C. under the Natural Gas Act.

Therefore, it is clear that Respondents could and would as contractually authorized and in a manner consistent with all applicable F.P.C. rules and regulations have received additional monies for their liquefiable hydrocarbons, gasoline, extracted plant products and dry or residue gas as sold to Arkla from 1961 through 1975 under the subject gas sales contract *had* Arkla as Respondents' contractual obligor elected to timely honor its contractual obligations to the Respondents herein and to timely "cooperate" with Respondents from 1961 through 1975. Moreover, as determined by the Louisiana Supreme Court, Arkla by breaching and violating Respondents' private contractual rights and by successfully withholding all of the true, relevant and material facts from Respondents for fourteen years effectively obstructed, hindered, prevented and precluded Respondents from timely and prospectively filing for, obtaining and receiving the legal and contractual fruits and benefits of their favored nations rights which were entirely compatible and consistent with the applicable rules and regulations of the F.P.C. under the Natural Gas Act.

Arkla in attacking the judgment of the Louisiana Supreme Court in this case has for the purpose of a

shock effect wrongfully and inaccurately asserted that Respondents were claiming compensatory damages and monetary reparations measured in part by contractually authorized prices for their dry or residue gas that were in excess of the maximum, lawful, just and reasonable area rates as previously fixed, established and approved by the F.P.C. in its *"Statement of General Policy No. 61-1"* (24 FPC 818) and *"Other Southwest Area Rate Order No. 607 and 607-A"* (18 C.F.R. §§ 154.109 and 154.109a). This allegation is completely false and untrue. As correctly determined and concluded by the Louisiana Supreme Court in its judgment dated March 5, 1979 at page 12:

> "We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission."

Moreover, Arkla in this proceeding has erroneously asserted and suggested that the Louisiana Supreme Court in resolving the quantum of damages issue in this case invaded and usurped the exclusive regulatory jurisdiction and authority of the F.P.C. and F.E.R.C. to protect consumers from excessive prices for dry or residue natural gas as sold in interstate commerce by determining and fixing maximum, lawful, just and reasonable area rates for the sale of natural gas in interstate commerce. This assertion is likewise completely false and inaccurate. Contrary to Arkla's wholly inaccurate charges which have obviously been made for the purpose of attempting to create a real and substantial federal question in this case, where none in fact

exists, the Louisiana Supreme Court in its judgment dated March 5, 1979 expressly concluded and held that:

> "*We note, at the outset, that this controversy involves plaintiffs' claims for damages arising from defendant's breach of a gas purchase contract.* The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. *There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues.* Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). *A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts.*
>
> It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion)
> . . .
>
> Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. . . . *This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act.*" (Emphasis added)

While Arkla as the wrongdoer bombastically and erroneously contends that the Louisiana Supreme Court in measuring and awarding compensatory damages and reparations in the instant case ignored, disregarded and exceeded the maximum, lawful, just and reasonable area rate ceilings as previously established and approved by the F.P.C. for the sale of dry or residue gas in interstate commerce under the 1952 contract, the Louisiana Supreme Court has contrary to Arkla's wholly inaccurate and erroneous assertions properly recognized, respected, honored and adhered to the maximum, lawful, just and reasonable area rate ceilings as previously established and approved by the F.P.C. (*"Statement of General Policy No. 61-1"* and *"Order 607 and 607-A"*) in its determination of a proper measure of compensatory damages and reparations in the instant case. In fact the Louisiana Supreme Court at page 11 of its March 5, 1979 judgment expressly noted and stated that:

> "At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates."

The November 8, 1976 order of the Commission (Exhibit D-59) as referred to and considered by the Louisiana Supreme Court in measuring damages and reparations in this case was rendered by the Commis-

sion in the proceeding "*Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al,* Docket No. RI 76-28", and in pertinent part provides that:

> "Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its *'Other Southwest Area Rate'* Opinion Nos. 607 and 607-A. The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:
>
> | Prior to January 1, 1965 | From Jan. 1, 1965 Thru Sept. 30, 1968 | From October 1 1968 thru 1972 |
> |---|---|---|
> | 16.7¢ per Mcf at 15.025 psia | 18.6¢ per Mcf at 15.025 psia | 20.6¢ per Mcf at 15.025 psia |
>
> Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery. . ."

The "March 8, 1976 Order" as referred to by the Commission in its "November 8, 1976 Order" (Exhibit D-59) was rendered by the Commission after it had fully studied and carefully considered Respondents' breach of contract action which was at that time pending in the Louisiana State district court for trial on its merits. In light of the applicable and controlling decisions of this Court, numerous other courts and its own *Rowan Policy, Rowan* v. *Allied Chemical Corp.,*

39 F.P.C. 64, 66, 67 (1968), the Commission in deferring the contractual issues as presented in this case to the Louisiana courts for resolution and adjudication properly concluded and correctly held that:

> "Arkansas Louisiana Gas Company (Arkla) on September 11, 1975, filed a petition for a declaratory order in the above-entitled proceeding contending that the 'favored nations' clause in the January 11, 1952 contract with Frank J. Hall, et al. (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. . . .
>
> *The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the Pan American case, supra, or the Rowan case, supra. This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.*
>
> For reasons set forth above, Arkla's petition for declaratory order filed on September 11, 1975 in the above-entitled proceeding is denied." (Emphasis added)

The fact that the Commission's regulatory responsibility to protect consumers from excessive prices is not affected or involved in this case was again subsequently recognized and confirmed by the conclusions of the F.E.R.C.'s own staff counsel in their brief dated August 23, 1978 and filed with the Commission in the proceeding, "*Arkansas Louisiana Gas Company* v.

Frank J. Hall, et al, Docket No. RI 76-28", wherein the Commission's staff counsel objectively and independenly observed and concluded that:

> "Only contracts executed prior to April 3, 1961 may contain favored nations clauses. Therefore, contracts involving jurisdictional sellers which contain these clauses will become relatively infrequent.
>
> *Concern that a court might order Arkla to pay excessive rates in the guise of contract damages is not warranted under the circumstances of this case. Even if respondents are entitled to a rate increase, the applicable ceiling rates under the Commission's regulations will impose a limitation on the damages respondents may receive from a court. . . .*
>
> *Therefore, the issue in this case is limited to the damages respondents may receive up to these ceiling rates; the question whether such damages would constitute an unreasonable and unjust rate, which would be in the exclusive jurisdiction of the Commission, Montana Dakota Utilities* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951), *is not present. Therefore, the Commission's regulatory responsibility to protect consumers from excessive rates is not involved.*" (Emphasis added)

Thus, in light of a fair, proper and objective analysis, it is clear that the instant lawsuit as now finally resolved and adjudicated by the Louisiana Supreme Court involved a judicial determination of Arkla's continued breach and violation of Respondents' private contractual rights for fourteen years and a judicial determination of the actual losses and damages Respondents sustained and incurred for fourteen years due to Arkla's continued breach of contract and Arkla's effective withholding and concealment of all of the true, relevant and material facts from Respondents for fourteen years. In light of the judgment of the Louisiana

Supreme Court it is abundantly clear that this case did *not* and does *not* involve or adversely affect the public's need to be protected from excessive prices for dry or residue natural gas as sold in interstate commerce. The F.P.C. in performing its regulatory responsibilities has properly and previously protected this relevant public interest by virtue of its enactment of its maximum, lawful, just and reasonable rate ceilings as set forth in its "*Statement of General Policy No. 61-1*" (24 FPC 818) and "*Other Southwest Area Rate Order No. 607 and 607-A*" (18 C.F.R. § 154.109 and 154.109a). As evidenced by the Louisiana Supreme Court's judgment, the Commission's maximum, lawful, just and reasonable area rate ceilings were in no way contested, challenged, violated or disputed in this case. The Commission in its prior orders has specified and confirmed its established and approved maximum, lawful, just and reasonable area rate ceilings for dry or residue natural gas sold under the subject private gas sales contract from 1961 to 1975. Moreover, the Commission has also confirmed that it has *not* and did *not* establish any maximum rate ceilings or prices for the liquefiable hydrocarbons, gasoline and extracted plant products as sold by Respondents to Arkla under the subject contract from 1961 to 1975.

The Louisiana Supreme Court has properly protected the "integrity" of Respondents' private contractual rights against the actual losses and damages sustained due to Arkla's continued breach and violation by awarding Respondents compensatory damages and monetary reparations in this case based upon nothing more than what Respondents could and would have received and obtained for their liquefiable hydrocarbons, natural gasoline, extracted plant products and

dry or residue gas as contractually authorized and in a manner fully consistent with all applicable laws, rules and regulations *had* Arkla *not* continuously breached and violated Respondents' private contractual rights for fourteen years and *had* Arkla *not* effectively obstructed, prevented and precluded the timely and prospective performance and fulfillment of Respondents' contractual rights for fourteen years. Further, the Louisiana Supreme Court in measuring damages has at the same time properly recognized, honored and respected the maximum, lawful, just and reasonable area rate ceilings as previously approved and established by the Commission for the sale of dry or residue gas in interstate commerce under the subject gas sales contract. Under fair and proper analysis the judgment of the Louisiana Supreme Court in this case does *not* in any manner adversely involve or affect the relevant public interest against excessive prices for dry or residue gas as sold in interstate commerce.

III. Without F.E.R.C.'s Express Approval and Consent Arkla May Not and Must Not Pass Through Any of the Compensatory Damages and Reparations Awarded Respondents in This Case to Its Public Consumers in Interstate Commerce.

Contrary to Arkla's rather inverted, diffuse, erroneous and self-serving theories, as obviously borrowed from Cities Service Gas Company, the Louisiana Supreme Court's judgment awarding Respondents compensatory damages and monetary reparations as rendered in this case on March 5, 1979 clearly does *not* involve or adversely affect the public interest against excessive prices for natural gas as sold in interstate commerce and does *not* in any way authorize, permit or even suggest that Arkla may pass through *any*

portion of the compensatory damages and reparations to its customers in interstate commerce as an increased cost for their dry or residue natural gas. As the matter now stands Arkla must and can easily pay the compensatory damages and reparations out of its own private fisc and corporate profits and in effect return to Respondents the unjust enrichment in the form of additional corporate profits that it has accumulated at Respondents' loss, damage, detriment and expense for fourteen years by continuously breaching and violating Respondents' private contractual rights for fourteen years and by effectively obstructing, preventing and precluding the timely implementation and enforcement of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.

Arkla in its annual corporate reports has represented that during the years that it has continuously breached and violated Respondents' private contractual rights and has unjustly enriched itself as a result thereof at Respondents' loss, damage, detriment and expense Arkla has accrued net corporate profits exceeding $500,000,000.00. While the unjust enrichment that Arkla has obtained at Respondents' loss, damage, detriment and expense during this period of time undoubtedly only contributed to Arkla's net corporate profits in a most minor and insignificant manner, clearly Arkla's payment of compensatory damages for those actual losses and Arkla's return of the accumulated and insignificant unjust enrichment will also be a most minor and insignificant payment out of Arkla's own private fisc and accumulated corporate profits. In this connection Arkla on August 19, 1975 in a public

filing with the Federal Securities and Exchange Commission acknowledged that in connection with Respondents' contractual rights to recover compensatory damages and monetary reparations for the actual losses sustained and incurred by Respondents due to Arkla's continued breach of contract for fourteen years:

> "It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.
>
> The reason this lawsuit was not reported in the prospectus is that, in our opinion, it is not 'material' in the sense in which the Commission uses the term in its rules with regard to the preparation of prospectuses. . . .
>
> We have no objection to describing the lawsuit in the prospectus; but since it is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects, we concluded that it should not be described in the prospectus."

Respondents respectfully submit that Arkla as the wrongdoer should have to pay for the actual losses and damages as caused by its own fault and wrongful breach of contract for fourteen years out of its own private fisc and accumulated corporate profits. However, if Arkla should now attempt to pass through any portion of the "not material" compensatory damages and monetary reparations as awarded to the Respondents herein as the result of the Louisiana Supreme Court's judgment in this case, the relevant public interest against excessive prices for dry or residue gas is

still fully protected not only by the fact that the Respondents' recoverable damages and reparations were measured by and limited to Respondents' contractually authorized prices for their liquid hydrocarbons and extracted plant products, the prices for which were never limited by the F.P.C.'s maximum ceiling rates, and to the contractually authorized prices for Respondents' dry or residue gas which were consistently and substantially *below* the maximum, lawful, just and reasonable area rate ceilings as previously established and approved by the F.P.C. in protecting the public from excessive prices, but also by the fact that Arkla must by means of a separate and subsequent administrative proceeding obtain the consent of the F.E.R.C. for any such proposed pass through by Arkla to its consumers in interstate commerce. Thus, the F.E.R.C. if called upon by Arkla can and will at that appropriate time exercise and perform its regulatory responsibility to further protect the relevant public interest. Unless and until the F.E.R.C. at Arkla's request authorizes and approves such a pass through, *not one penny* of the "not material" compensatory damages and reparations as awarded to Respondents in this case by the Louisiana Supreme Court can be passed through by Arkla to any of its consumers in interstate commerce. Hence, it is readily apparent that the F.E.R.C.'s regulatory responsibilities are not involved, affected or impaired by the Louisiana Supreme Court's decision in this breach of contract case and that the F.E.R.C. can at the appropriate time again fully exercise its regulatory responsibility if called upon by Arkla.

This same point involving the responsibility of courts to award compensatory damages and reparations for the actual losses caused by the breach and violation of private contractual rights on the one hand

and the regulatory responsibility of the Commission to protect consumers from excessive prices for natural gas sold in interstate commerce on the other hand was presented to and properly reconciled and resolved by the Courts and the Commission in the recent case of *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972) and *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976). As this Court will recall, the Oklahoma Supreme Court awarded Western Natural Gas Company, "Western", a seller under a 1949 private gas sales contract that covered the sale of natural gas in interstate commerce and that was filed as part of a rate schedule under the Natural Gas Act with the F.P.C., compensatory damages and monetary reparations in the sum of $5,026,000.00 for the actual losses caused by Cities Service Gas Company's, "Cities", similar breach and violation of its private contractual duties and obligations to "cooperate" with Western as the pipeline purchaser under the 1949 private gas sales contract. In that case, like the instant case, the Oklahoma Supreme Court in light of the factual evidence found and concluded that Cities by withholding certain facts and its "cooperation" from Western had breached the contract and had improperly hindered, obstructed and precluded Western from timely filing for, obtaining and receiving the F.P.C.'s administrative approval necessary under the Natural Gas Act to abandon the 1949 gas sales contract and to subsequently sell its natural gas under new contracts at prices higher than those stipulated in the 1949 private gas sales contract on file with the Commission.

The Oklahoma Supreme Court, like the Louisiana Supreme Court in the instant case, applied a well established rule and principle of contract law, equity and justice to its factual and evidentiary findings and held that:

> "Cities, as an institution schooled in production, transmission and sale of natural gas, acquainted with the exigencies of FPC control of the interstate transmission and sale of natural gas, knew when it obstructed by misrepresentation and in bad faith, Western's effort to abandon service to Cities under the 1949 contract, that its obstructive efforts could not only defeat Western's abandonment application but would impede, if not completely defeat other necessary efforts to obtain FPC authorization and to make operating arrangements to deliver Western's gas to KPL. Cities will not be permitted to assert in its defense the delays which Cities itself has caused. Gulf Oil Corporation v. American Louisiana Pipe Line Company, supra. . . .
>
> . . .there is nothing speculative in the assertion that damage results when a producer's contractual opportunity to sell his gas at a higher price per mcf is defeated."

After the Oklahoma Supreme Court properly awarded Western compensatory damages and monetary reparations for the actual losses caused by Cities' continued breach of the 1949 private gas sales contract on file with the Commission and Cities' failure to "cooperate" with Western in prospectively obtaining the requisite governmental approval necessary to implement and fulfill the true purpose and intent of the contract as measured by the higher prices that Western could and would have received for its natural gas as

contractually authorized and consistent with the F.P.C.'s rules and regulations from 1963 to 1983, Cities then, like Arkla in the instant proceeding, appealed to and petitioned this Court to review and reverse the damage judgment of the Oklahoma Supreme Court on the basis that the Oklahoma Supreme Court had in resolving the breach of contract issue and in measuring and awarding compensatory damages purportedly invaded the exclusive regulatory jurisdiction of the F.P.C. to grant abandonment orders, to determine, fix and establish maximum, lawful, just and reasonable area rate ceilings for the sale of natural gas in interstate commerce and to protect the public from excessive prices for natural gas as sold in interstate commerce under the Natural Gas Act. See: *Cities Service Gas Co.* v. *Western Natural Gas Co.,* Docket No. 72-600, Supreme Court of the United States. This Court in light of its applicable and controlling decisions on December 11, 1972 properly *dismissed* Cities Service Gas Company's appeal and properly *denied* Cities Service Gas Company's petition for a writ of certiorari. See: *Cities Service Gas Co.* v. *Western Natural Gas Co.,* 409 U.S. 1052 (1972).

After the breach of contract case and award of compensatory damages had been finally and definitively concluded in the Courts, Cities in 1973 petitioned the F.P.C. for permission to pass through a portion of the damages as awarded Western by the Oklahoma Supreme Court to its consumers in interstate commerce. See: F.P.C. Docket No. RP 71-106 (1973 Phase). The F.P.C. in further exercising its regulatory responsibility to protect consumers in interstate commerce from excessive prices and costs for natural gas apparently in that proceeding determined that it would

in that case be consistent with the public interest for it to permit Cities to pass through and recover a portion of the damages from its customers in interstate commerce. In the review proceedings before the United States Court of Appeals for the District of Columbia Circuit, *Cities Service Gas Co.* v. *F.P.C.,* 535 F.2d 1278 (D.C. Cir. 1976), that court correctly noted and held:

> "In 1966 Western brought suit against Cities in the District Court of Oklahoma County, Oklahoma, alleging that Cities' opposition to Western's request for permission to abandon deliveries to Cities breached a continuing express and implied obligation to carry out the termination provisions of the 1949 contract and to cooperate in obtaining any necessary government approval. . . .
>
> In the Oklahoma suit Western's claim was for breach of contractual obligations . . . Although passage of the Natural Gas Act (specifically section 7(b)) may have given Cities an effective means by which it could frustrate El Paso's prior contractual rights and prevent Western from entering into a more lucrative arrangement with El Paso, the Oklahoma jury and courts found that the Act did not shield Cities from breach of contract liability. . .
>
> Western was entitled under Oklahoma law to Cities cooperation in seeking FPC authorization to abandon service to Cities, i.e., to a full and fair disclosure by Cities of the facts relevant to the FPC's determination of how the public interest could best be served. This was the holding of the Oklahoma courts and the consistent position of Western before those courts and the Commission.
>
> To be sure, the price per Mcf of Western's gas, if deliveries continued to Cities, was one important factor in the Oklahoma jury's determination of a proper measure of damages. However, other

equally important factors included the volume of Western's gas reserves; future operating expenses; future excise, property, and income taxes; and the discount factor used to compute present worth . . . the Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the Natural Gas Act to pay the just and reasonable rate for gas severed and delivered to it. . .

In its 18 March order the FPC correctly distinguished between Cities' obligation under the Act to pay the just and reasonable rate for gas delivered to it (the issue before the Commission) and Cities' separate and independent obligation to respond in damages for private contractual breaches (the issue before the Oklahoma courts). . . . the Commission's order in Docket No. RP71-106 (1973 Phase), wherein the FPC approved a recovery by Cities from its customers of part of the Oklahoma court judgment."

Just as the Oklahoma Supreme Court properly and correctly resolved and adjudicated a private contractual damage dispute between Cities Service Gas Company and Western Natural Gas Company by applying well established rules and principles of contract law, equity and justice to the true and actual facts in that case, the Louisiana Supreme Court has in this case now properly resolved and adjudicated a similar private contractual damage dispute between Arkla and Respondents by applying these same well established rules and principles of contract law, equity and justice to the true and actual facts in this case. Just as the FPC at the proper time exercised its regulatory responsibility

to protect the relevant public interest when Cities Service Gas Company requested permission to pass through a portion of the damages to its consumers in interstate commerce, the F.E.R.C. can in connection with any subsequent attempt by Arkla to pass through any of the compensatory damages as awarded Respondents in this case to its consumers in interstate commerce properly exercise its regulatory responsibilities to further protect Arkla's interstate consumers at the appropriate time.

Unless and until the F.E.R.C. in the exercise of its regulatory responsibility to protect the public from excessive prices approves a request by Arkla to pass through some of the damages as awarded Respondents in this case, *none* of the damages may be passed through or recovered by Arkla from its consumers in interstate commerce.

IV. Arkla's Self-serving "Catch-22—Filed Rate Theory" by Means of Which It Attempts to Legally Take Advantage of Its Own Continued Breach of Contract and Misconduct for Fourteen Years and to Escape Its Contractual Liabilities Is Contrary to Well Established Rules and Principles of Law, Equity and Justice.

The undisputed evidence and final decision of the Louisiana Supreme Court below in this case establish beyond dispute that Arkla as Respondents' contractual obligor wrongfully injured and damaged Respondents for fourteen years by continuously breaching and violating Respondents' private contractual rights and by successfully misrepresenting, withholding and concealing all of the true, relevant and material facts from Respondents for fourteen years. Without question Arkla as the wrongdoer effectively obstructed, pre-

vented and precluded Respondents from timely discovering and obtaining any of the true, relevant and material facts necessary for Respondents to prospectively file for, implement, effectuate and enforce their private contractual rights to higher prices for their liquefiable hydrocarbons, gasoline, extracted plant products and their dry or residue natural gas as sold to Arkla under the subject private gas sales contract from 1961 through 1975, either administratively or judicially.

Specifically, with respect to the evidence in this case and the factual findings of all of the courts in this case, it is an inescapable fact that Arkla wrongfully and improperly rendered it impossible for Respondents to timely and prospectively prepare and file an administrative notice with the F.P.C. setting forth the relevant facts necessary to demonstrate their contractual entitlement to receive higher prices for their dry or residue natural gas as sold to Arkla from September, 1961 to October, 1972 (the time when Respondents became administratively classified as "small producers"), which contractually authorized prices were in fact well *below* the Commission's approved maximum, lawful, just and reasonable area rate ceilings. Likewise, Arkla as the wrongdoer for fourteen years absolutely prevented and precluded Respondents from prospectively taking any legal action necessary to protect and enforce their private contractual rights to receive and obtain higher prices for their liquefiable hydrocarbons, gasoline and extracted plant products as sold to Arkla under the 1952 contract by effectively mispresenting, withholding and concealing all of the true, relevant and material facts from Respondents for fourteen years.

Arkla, in borrowing still another theory from Cities Service Gas Company, asserts in this proceeding that because it successfully obstructed, prevented and precluded Respondents from prospectively filing for, effectuating and enforcing their private contractual rights, either administratively or judicially, for fourteen years Respondents have lost their fundamental legal right to judicially recover compensatory damages and monetary reparations for the actual losses and injuries caused and sustained as a direct result of Arkla's continued breach of contract and Arkla's effective concealment of the true facts from Respondents for fourteen years. Arkla's reuse of Cities Service Gas Company's "Catch 22—filed rate theory" is a non sequitur and in a case such as this where Arkla as the pipeline purchaser, like Cities Service Gas Company, has by its own continued breach of contract and misconduct prevented the prospective performance and fulfillment of the contract in a manner consistent with all applicable laws, rules and regulations this "theory" is completely abhorrent to well established rules of law, equity and justice. Clearly, Respondents could not make any administrative filings or take any action whatsoever as long as Arkla effectively withheld and successfully concealed all of the true, relevant and material facts from Respondents for fourteen years. The injustice of such a "theory" was properly recognized by the Courts in the *Cities Service Gas Company* cases, supra, and must again be recognized in the instant proceeding.

It is obvious that the Natural Gas Act and the filing procedures as provided for therein were predicated on the assumption that pipeline purchasers, such as Cities Service Gas Company and Arkla in this case, would always timely honor their contracts and prospectively

cooperate with sellers when necessary. Clearly, the Natural Gas Act does not contemplate, address or provide for the situation where a pipeline purchaser, such as Cities Service Gas Company and Arkla in this case, would wrongfully obstruct, prevent and preclude a seller from timely making any necessary filings with the Commission for fourteen years. Contrary to Arkla's borrowed, erroneous and self-serving contentions in this proceeding, Congress by enacting the Natural Gas Act never intended for the administrative filing procedures to be improperly frustrated and wrongfully used by pipeline purchasers to abrogate, escape and evade their legitimate contract obligations. Moreover, as repeatedly confirmed by this Court and numerous other courts of this Nation, Congress by enacting the Natural Gas Act never intended to abrogate or destroy the jurisdiction, power and authority of the courts to award compensatory damages and monetary reparations for the actual losses and damages caused by a pipeline purchaser's breach and violation of private contract rights and the improper frustration of the fulfillment of legitimate private contract rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations. See: *Skelly Oil Co., et al* v. *Phillips Petroleum Co.,* 399 U.S. 667 (1950); *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U.S. 332 (1956); *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir. 1960); *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.,* 535 F.2d 1278 (D.C. Cir. 1976); *State of Louisiana* v. *F.P.C.,* 503 F.2d 844 (5th

Cir. 1974); *Monsanto Co.* v. *F.P.C.,* 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co.* v. *F.P.C.,* 476 F.2d 121 (5th Cir. 1973); *City of New Orleans, Louisiana* v. *United Gas Pipe Line Co.,* 390 F.Supp. 861 (E.D. La. 1974); and *Skelly Oil Co.* v. *F.P.C.,* 532 F.2d 177 (10th Cir. 1976).

In properly resolving and justly adjudicating the instant legal and contractual damage dispute between Respondents and Arkla, the Louisiana Supreme Court in its judgment dated March 5, 1979 correctly recognized and applied well established rules and principles of contract law, equity and justice to the true facts as established in this case when it expressly held that:

> *"We note, at the outset, that this controversy involves plaintiffs' claims for damages arising from defendant's breach of a gas purchase contract.* The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. *There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues.* Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). *A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts. . .*

Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition who prevents the fulfillment. George W. Garig Transfer v. Harris, *supra;* Southport Mill v. Friedrichs, *supra;* Morrison v. Minton, *supra. This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act. See* Cox v. Department of Highways, 252 La. 22, 209 So. 2d 9 (1968) . . .

To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. *However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller.* Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, *it is apparent that defendant prevented the fulfillment of that condition* (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. *Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach* (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. *To hold otherwise would be*

in clear contravention of the spirit and intent of article 2040 and the jurisprudence of this court.[6]

Footnote 6: We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, '[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition.' 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959)." (Emphasis added)

Contrary to Arkla's erroneous assertions in this proceeding, the Respondents herein have a well established and fundamental legal right to be protected against and to be compensated for the actual losses and damages which they sustained and incurred for fourteen years because Arkla through its own "uncooperative", "evasive" and "not commendable" conduct continuously breached and violated Respondents' legitimate private contractual rights for fourteen years and effectively obstructed, prevented and precluded the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner fully consistent with the Natural Gas Act and the applicable rules and regulations of the F.P.C. for fourteen years by successfully misrepresenting, withholding and concealing all of the true, relevant and material facts from Respondents for fourteen years. Contrary to Arkla's erroneous assertions in this pro-

ceeding, well established rules and principles of law, equity and justice do not permit Arkla in defense of this case to legally rely upon the non-performance of the contract that it has caused by its continued breach of contract for fourteen years or to take advantage of its own "uncooperative", "evasive" and "not commendable" misconduct which effectively obstructed, prevented and precluded the prospective performance and fulfillment of the contract for fourteen years.

A brief review of the jurisprudence of this Nation completely refutes Arkla's erroneous contentions and clearly evidences the correctness, fairness and justness of the Louisiana Supreme Court's final judgment in this case, to wit:

(a) *United States* v. *Peck,* 102 U.S. 64 (1880):

> ". . . the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison, Cont., sec. 326; Fleming v. Gilbert, 3 Johns., 527. . . 'It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.'."

(b) *Deitrick* v. *Greaney,* 309 U.S. 190 (1940):

> "It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See United States v. Dunn, 268 US 121, 133, 69 L ed 876, 882, 45 S Ct. 451; Independent Coal & Coke Co. v. United States, 274 US 640, 648, 71 L ed 1270, 1278, 47 S Ct 714."

(c) *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975): "And where a legal injury is of an economic character,

> '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867)."

(d) *Story Parchment Co.* v. *Paterson P. Paper Co.,* 282 U.S. 555 (1931):

> "As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. . .
>
> '. . . And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.'."

(e) *Watson Bros. Transportation Co.* v. *Jaffa,* 143 F.2d 340 (8th Cir. 1944):

> "But the Commission remains an administrative board exercising administrative power, and is not a court, and has no judicial power, although it has and exercises a quasi judicial power. 15 C.J.S., Commerce, § 141, p. 501. In the first volume of its reports, the Commission declared 'The power to enforce contracts is not one which has been confided to us', Traders, etc. v. Philadelphia, et., Co., J.C.C. 122, at page 131. . .

But a man's obligation under his lawful contract is not a whit less binding upon him because of the fact that an approval of the transaction must be had before the party to whom he has obligated himself can receive full benefits. . .

Such owners remain fully responsible in morals, law and equity on such undertakings as they enter into. . .

The mere fact that a contract or transfer is subject to the approval of a public agency is not a bar to a decree compelling a party to execute the documents necessary for the consummation of the contract. . .

'If petitioner has contracts * * * and if any of the matters related in this evidence it has been injured and wronged by the defendants, there are courts provided by law having jurisdiction to hear and determine controversies of that character.'."

(f) *Gridiron Steel Co.* v. *Jones & Laughlin Steel Corp.*, 361 F.2d 791 (6th Cir. 1966):

"A statement of this proposition is its refutation. Even where liability under a contract depends upon a condition precedent, one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it. Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12, 16 (6th Cir. 1965); Gulf Oil Co. v. American Louisiana Pipe Line Co., 282 F.2d 401 (6th Cir. 1960)."

(g) *Peter Kiewit Sons' Co.* v. *Summit Construction Co.*, 422 F.2d 242 (8th Cir. 1969):

"It is hornbook law that an implied provision of every contract is that neither party to the contract will do anything to prevent performance thereof by the other party or commit any act that will hinder or delay performance. Northeast Clackamas C.E. Co-op v. Continental Gas Co., 221 F.2d 329, 334 (9th Cir. 1955); George A. Fuller Co. v. United States, 69 F.Supp. 409, 411-12, 108 Ct.Cl. 70 (1947); Restatement of Contracts, § 315 (1) (1932)."

(h) *Ballard* v. *El Dorado Tire Co.*, 512 F.2d 901 (5th Cir. 1975):

"It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.

In reflecting upon this jural proposition, a federal court has observed that 'Where liability under a contract depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it.'. The illustration of this principle are legion. 5 Williston on Contracts § 677, pp. 224-225, quoting Gulf Oil Corp. v. American Louisiana Pipe Line Co., 6 Cir., 1960, 282 F.2d 401."

(i) *Ammerman* v. *Miller*, 488 F.2d 1285 (D.C. Cir. 1973):

"Deeply rooted in our jurisprudence is the rule applied by the District Court herein as enunciated in Coastal Oil Co. v. Eastern Tankers Seaways Corp., 29 N.J. Super. 565, 103 A.2d 26 (1954) as follows:

'It is well established as a principle of fundamental justice that if a promisor prevents or hinders the occurrence or fulfillment of a condition in a contract, and

the condition could have been fulfilled except for such hindrance or prevention on the part of the promisor, then the performance of the condition is excused and the liability of the promisor is fixed regardless of failure to fulfill the condition.' 103 A.2d 32.

See also United States v. Peck, 102 U.S. 64, 26 L. Ed. 45 (1880); Gulf Oil Corporation v. American Louisiana Pipe Line Co., 282 F.2d 401 (6th Cir. 1960); Tradewell Foods v. New York Credit Men's Adj. Bur., 179 F.2d 567 (2nd Cir. 1950); Restatement of Contracts, §§ 294, 295 (1932); 5 S. Williston, Contracts § 677 (3rd ed. 1961); 17A C.J.S. Contracts § 468b (1963)."

(j) *Christenson* v. *Felton,* 322 F.2d 323 (9th Cir. 1963):

"It has been good contract law that if the happening of such a condition is caused by the conduct of the promisor it will not terminate the duty of the promisor. (Restatement, Contracts § 302 (1932) and cf § 307) This is but an application of the established principle that equity will not permit one to rely on his own wrongful act. (Deitrick v. Greaney, 1940, 309 U.S. 190, 196, 60 S.Ct. 480, 84 L.Ed. 694) (Also see 3A Corbin, Contracts § 677 (3d ed. 1961))."

(k) *George W. Garig Transfer* v. *Harris,* 75 So.2d 27 (La. S.Ct. 1954):

". . 'It is clear, then, the law does not permit the party whose obligation depends on a condition, to allege the non-performance of that condition in defence, where it was through his fault it was not performed,' and 'It is a trite

and perfectly well established principle of jurisprudence, that no man can take advantage of his own wrong, and the law has been careful to make a special application of this maxim to cases where conditions form part of the contract. Coke on Littleton, 221-22. Digest, liv. 45, tit. 1, law 89. Pothier on Obligations, no. 212.' 3 La. at pages 502 and 501. Clearly, under the facts of this case, the defendant was without legal or moral right to withdraw from the joint application to secure the transfer from the Public Service Commission, and, by withdrawing, has brought about the failure to receive the approving Order of the Commission, since it is clearly stated in the ruling of that body that but for the withdrawal of the defendant, the transfer would have been approved."

(l) *Perrin* v. *Rodriguez,* 153 So. 555 (1934):

"A defendant who either intentionally or unknowingly 'succeeds in concealing from a creditor his cause of action cannot be allowed to reap the benefit of his own wrong.' (Syllabus No. 3). Hyman v. Hibernia Bank & Trust Company et al. 139 La. 411, 71 So. 598. See, also, Bernstein v. Commercial National Bank, 161 La. 38, 108 So. 117."

(m) *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F. 2d 401 (6th Cir. 1960):

"The District Judge further held that even if a permanent certificate had been contemplated by the parties, Gulf was still precluded from cancelling the contract. He found that Gulf, by its own conduct was instrumental in delaying and preventing the issuance of the permanent certificate by the Federal Power Commission prior to the expiration of the six month period.

Where liability under a contract depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it. Suter v. Farmers Fertilizer Co., 100 Ohio St. 403, 411, 126 N.E. 304; Atlas Trading Corp. v. S. H. Grossman, Inc., 3 Cir., 169 F.2d 240; Corbin on Contracts § 1266 (1951 ed.). . .

Certainly Gulf may not rely on the delay which it brought about by its own conduct to justify its cancellation of the contract. It was obligated to do nothing which would hinder, delay or prevent the granting of its certificate within the time provided by the contract.

(n) *Western Natural Gas Co.* v. *Cities Service Gas* Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972):

"This appeal by Cities Service Gas Company (Cities) seeks reversal of a judgment based upon a jury verdict against Cities in favor of Western Natural Gas Company . . . in the sum of $5,026,626 with interest thereon at 10% per annum from May 8, 1969, . . . Western claimed that Cities had breached implied obligations in a contract covering the sale of natural gas from Western to Cities resulting in damages to Western. . .

Cities says further that when Western in 1954 applied for and received under the Natural Gas Act a certificate of public convenience and necessity for the continued service to Cities, Western lost its right to maintain this action. . .

Here the FPC could not take remedial cognizance over Cities' contract violation.

We do not agree with Cities' contention that the trial court's judgment is an invasion of

the exclusive jurisdiction of the FPC. . . Issues involving contract violation were not made subject to the cognizance of FPC by the enactment of the Natural Gas Act. Pan American Petroleum Corporation v. Superior Court, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584; Gulf, supra.

Western's cause of action against Cities . . . is for violation of the implied contract obligation to make a fair and full disclosure of the facts relevant to FPC's determination of where the public interest lies and for having committed this violation in part by presenting objections without a substantial basis in fact and contrary to facts for the single purpose of serving the private corporate purposes of Cities '* * * in every contract there exists an implied covenant of good faith and fair dealings, and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract.' 17A C.J.S. Contracts § 328, pp. 284-286. . .

Gulf Oil Corporation v. American Louisiana Pipe Line Co., C.A. 6th, 282 F.2d 401, at 404. . . The Court of Appeals said: 'Certainly Gulf may not rely on the delay which it brought about by its own conduct to justify its cancellation of the contract. *It was obligated to do nothing which would hinder, delay or prevent the granting of its certificate within the time provided by the contract.*' (emphasis supplied) And see 17A C.J.S. Contracts § 328, pp. 284-286, supported by notes 40.5 and 41. Moreover the regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Natural Gas Act. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373. . .

Cities, as an institution schooled in production, transmission and sale of natural gas, acquainted with the exigencies of FPC control of the interstate transmission and sale of natural gas, knew when it obstructed by misrepresentation and in bad faith, Western's effort to abandon service to Cities under the 1949 contract, that its obstructive efforts could not only defeat Western's abandonment application but would impede, if not completely defeat other necessary efforts to obtain FPC authorization and to make operating arrangements to deliver Western's gas to KPL. Cities will not be permitted to assert in its defense the delays which Cities itself has caused. Gulf Oil Corporation v. American Louisiana Pipe Line Company, supra. . .

. . . there is nothing speculative in the assertion that damage results when a producer's contractual opportunity to sell his gas at a higher price per mcf is defeated.

Finding no reversible error, we affirm the judgment of the trial court.

All Justices concur."

(o) *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976):

"In 1966 Western brought suit against Cities in the District Court of Oklahoma County, Oklahoma, alleging that Cities' opposition to Western's request for permission to abandon deliveries to Cities breached a continuing express and implied obligation to carry out the termination provisions of the 1949 contract and to cooperate in obtaining any necessary government approval. . .

In the Oklahoma suit Western's claim was for breach of contractual obligations. . . Although

passage of the Natural Gas Act (specifically section 7(b)) may have given Cities an effective means by which it could frustrate El Paso's prior contractual rights and prevent Western from entering into a more lucrative arrangement with El Paso, the Oklahoma jury and courts found that the Act did not shield Cities from breach of contract liability. . .

Western was entitled under Oklahoma law to Cities cooperation in seeking FPC authorization to abandon service to Cities, i.e., to a full and fair disclosure by Cities of the facts relevant to the FPC's determination of how the public interest could best be served. This was the holding of the Oklahoma courts and the consistent position of Western before those courts and the Commission.

To be sure, the price per Mcf of Western's gas, if deliveries continued to Cities, was one important factor in the Oklahoma jury's determination of a proper measure of damages. However, other equally important factors included the volume of Western's gas reserves; future operating expenses; future excise, property, and income taxes; and the discount factor used to compute present worth . . . the Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the Natural Gas Act to pay the just and reasonable rate for gas severed and delivered to it. . .

In its March order the FPC correctly distinguished between Cities' obligation under the Act to pay the just and reasonable rate for gas delivered to it (the issue before the Commission) and Cities separate and independent ob-

ligation to respond in damages for private contractual breaches (the issue before the Oklahoma courts). . ."

(p) *Whitfield Const. Co., Inc.* v. *Commercial Devel. Corp.*, 392 F.Supp. 982 (1975):

"There is an implied condition in every contract that each party owes the other a duty to cooperate to the fullest, and cannot be heard to complain if it has violated that duty. Natking & Co. v. George A. Fuller Co., 347 F. Supp. 17 (W.D.Mo. 1972)."

See also: *Ohashi* v. *Verit Industries*, 536 F.2d 849 (9th Cir. 1976); *Keener* v. *Sizzler Family Steak Houses*, 424 F.Supp. 482 (N.D. Tex.1977); *Lee Shops, Inc.* v. *Schatten-Cypress Co.*, 350 F.2d (6th Cir. 1965); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161 (2nd Cir. 1966); *Foster* v. *Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. 1967); *Callon Petroleum Co.* v. *Big Chief Drilling Co.*, 548 F.2d 1174 (5th Cir. 1977); *Concrete Specialties* v. *H. C. Smith Construction Co.*, 423 F.2d 670 (10th Cir. 1970); *Kentucky Skilled Craft Guild* v. *General Electric Co.*, 431 F.2d 62 (6th Cir. 1970); *C. H. Codding & Sons* v. *Armour and Co.*, 404 F.2d 1 (10th Cir. 1968); *Ace Construction Co.* v. *W. H. Nichols & Co., Inc.*, 353 F.2d 110 (10th Cir. 1965); *Ryder Truck Rental, Inc.* v. *Central Packing Co.*, 341 F.2d 321 (10th Cir. 1965); *Matter of Fabric Tree*, 426 F.Supp. 872 (S.D.N.Y. 1977); *Waters* v. *Key Colony East, Inc.*, 345 So.2d 367 (Fla. 1977); *Transnational Insurance Co.* v. *Rosenlund*, 261 F.Supp. 12 (D.Or. 1966); *Galfand* v. *Chestnutt*, 402 F.Supp. 1318 (S.D. N.Y. 1975); *Glassman Const. Co., Inc.* v. *Maryland City Plaza, Inc.*, 371 F.Supp. 1154 (D.Md. 1974); *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. U. Local 584*, 222 F.Supp. 125 (1963); *Casale* v. *Carrigan and Boland, Inc.*, 288 So.2d 299 (La.App. 1974); *Groghan* v. *Billingsley*, 313 So.2d 255 (La.App. 1975); *Briggs* v. *Siggio*, 285 So.2d 324 (La.App. 1976); and *Chartres Corp.* v. *Charles Carter & Co., Inc.*, 346 So.2d 796 (La.App. 1977).

The Louisiana Supreme Court by correctly recognizing and applying these same well established rules and fundamental principles of contract law, equity and justice to the true and actual facts as established in this case has properly held that Arkla as the wrongdoer may not avail itself of the non-performance of the contract that it has occasioned for fourteen years and that Arkla may not legally take advantage of its own wrongful misconduct for fourteen years in defense of this case. The Louisiana Supreme Court by correctly applying these same well established rules and principles of contract law, equity and justice to the true facts in this case has in the final analysis properly resolved and justly adjudicated a private contractual damage dispute between Respondents and Arkla and the final judgment of the Louisiana Supreme Court in this case correctly recognized and enforced Arkla's separate and independent contractual obligations to respond in compensatory damages and reparations for the actual losses and damages caused by Arkla's wrongful and continued breaches and violations of Respondents' private contractual rights for fourteen years. In light of the true and actual facts of this case, fundamental rules and principles of contract law, equity and justice and proper analysis, it is clear that the final judgment of the Louisiana Supreme Court in this case does justice to the parties in this lawsuit and does *not* involve or affect any real or substantial federal questions.

CONCLUSION

In light of the true and actual facts of this case and applicable and controlling rules and principles of contract law, equity and justice, Arkla's petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1979

APPENDIX

APPENDIX I.

(March 5, 1979 Judgment of Louisiana Supreme Court)

SUPREME COURT OF LOUISIANA

No. 62,560

FRANK J. HALL, ET AL

v.

ARKANSAS-LOUISIANA GAS COMPANY

On Writ of Certiorari to the Second Circuit Court of Appeal Parish of Caddo, State of Louisiana

MARCUS, *Justice**

Plaintiffs, royalty interest owners, working interest owners, overriding royalty interest owners and unleased mineral interest owners, instituted this suit against Arkansas-Louisiana Gas Company to recover damages arising from an alleged breach of a gas purchase contract.

Plaintiffs, in their original and amended and supplemental petitions, alleged that on January 11, 1952, they, or their respective ancestors in title, entered into a gas purchase agreement with defendant wherein plaintiffs agreed to sell to defendant their natural gas, and the natural gas owned by their respective lessors, produced from certain described lands in the Sligo Gas Field, Bossier Parish, Louisiana. This agreement, by its terms, was to continue in effect from January 11, 1952, through June 1, 1980. Under the terms and provisions of this agreement, defendant was to pay a fixed schedule of prices for the natural gas delivered to it from plaintiffs. This agreement also contained a price adjustment provision, commonly referred to as a favored nations clause, which provided in pertinent part:

> If at any time during the term of this agreement Buyer should purchase from another party seller gas

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* Chief Judge William A. Culpepper participated in this decision as Associate Justice Ad Hoc sitting in the place of Chief Justice Sanders, retired.

> produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract. . . . It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

Plaintiffs alleged that since January 11, 1952, they and their respective lessors, have sold substantial quantities of natural gas produced from wells in the Sligo Gas Field to defendant at the prices stipulated in the fixed schedule of prices as contained in the agreement. Plaintiffs further alleged that from September 1961 until the date of the institution of this action, defendant purchased from another party seller (the United States government) natural gas produced from wells located in the Sligo Gas Field at a higher price (including prices paid for both the residue or dry gas and the liquid hydrocarbons or plant products extracted from the United States government's gas delivered to defendant's pipeline system) than it was paying to plaintiffs pursuant to the January 11, 1952 gas purchase agreement for plaintiff's dry or residue gas and liquid hydrocarbons or plant products extracted from plaintiff's gas and delivered into defendant's pipeline system. By paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field, plaintiffs contended that defendant activated the provisions of the favored nations clause and legally obligated itself to advise

plaintiffs of these facts and pay plaintiffs the higher price being paid to another party seller (the United States government) for natural gas produced from wells in the Sligo Gas Field. Plaintiffs contended that they were entitled to such higher price from the first time defendant paid such higher price to another party seller. Plaintiffs averred that defendant had at no time during the existence of the January 11, 1952 agreement informed plaintiffs, or any of their representatives, of the fact it had been paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs thus argued that defendant had breached the favored nations clause of their agreement by failing to pay plaintiffs a price equal to the highest price paid by defendant to any other party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs sought damages equal to the difference between the price paid to them and the highest price paid by defendant to any other party seller for such natural gas during the period of time that defendant purchased natural gas from the United States government.

In its answer, defendant admitted that it purchased substantial quantities of natural gas from plaintiffs pursuant to the January 11, 1952 gas purchase agreement. Defendant, however, averred that it had not at any time paid anyone a price higher than that paid plaintiffs for natural gas purchased from the Sligo Gas Field and it specifically denied that it was purchasing any natural gas produced from the Sligo Gas Field from the United States government. Further answering the petition, defendant alleged that the only contract between it and the United States government relating to the production of natural gas from the Sligo Gas Field was an oil, gas, and mineral lease dated January 23, 1961, and executed by the United States Department of the Interior in favor of Union Producing Co. and covering land situated in the Sligo Gas Field. Defendants averred that it acquired an undivided 15% interest in this lease by virtue of an assignment from Union Producing Co. on

January 30, 1961, and argued that this lease did not constitute an offer or contract to sell natural gas, but, rather, granted defendant only the right to explore for, remove, and dispose of oil and gas. Hence, defendant contended, the only payments made by it to the United States government were the payments of royalty (based on the value of the natural gas and other products extracted from the natural gas) as provided in the lease and not payments for the purchase of natural gas from the United States government.

By supplemental and amended answer, defendant further alleged that the Federal Power Commission, pursuant to the provisions of the Natural Gas Act (15 U.S.C. § 717 a-w) had sole jurisdiction over the sale of natural gas by plaintiffs to defendant under the January 11, 1952 gas purchase agreement upon which this action was founded. Defendant contended that, pursant to 15 U.S.C. § 717 c(d),[1] plaintiffs were required to file and give notice of any proposed increase of rates, including any contractually-authorized rate increase, above the authorized initial rate and that, as plaintiffs had failed to file for such rate increase allegedly allowable under the favored nations clause, they

[1] 15 U.S.C. § 717c(d) provides:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto; except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

were not lawfully authorized to collect the increased rate in this action. In addition, defendant averred that one of the named plaintiffs, W. E. Hall, Jr., executed, on May 25, 1969, an amendment to the gas purchase agreement of January 11, 1952, which deleted the favored nations clause from his contract with defendant. In view of this amendment, defendant contended that W. E. Hall, Jr. had no cause or right of action for any claim against defendant arising on or after May 25, 1969.

The trial court first held that payments made by defendant to the United States government under the terms of the lease constitued a "purchase from another party seller" within the meaning of the favored nations clause contained in the January 11, 1952 gas purchase contract entered into between plaintiffs and defendant. The court reasoned that defendant, in making payments to the United States government under its lease, was acting in a dual capacity: it was paying royalty as lessee and purchasing gas as pipeline purchaser. The court determined that defendant failed to advise plaintiffs of this fact or pay them the higher, contractually-authorized price. Having held that defendant breached the original gas purchase contract, the trial court next concluded that defendant would only be liable for damages (measured by the difference between the price paid the United States government and the price paid plaintiffs) for the period subsequent to the issuance of small producer certificates to plaintiffs in October 1972. The court reasoned that plaintiffs could not recover a "raise in prices" for the period prior to October 1972 because they had never obtained approval of a higher rate or price from the Federal Power Commission as required by 15 U.S.C. § 717 c-d. The trial judge noted, however, that the regulations of the Commission (18 C.F.R. § 157.40) provide that a "small producer," as defined in the regulations, may obtain a small producer certificate from the Commission exempting it from the necessity of filing a rate

schedule in order to obtain contractually-authorized rate increases if the rate increase does not exceed the ceiling rate set by the Commission. The trial judge determined that plaintiffs had obtained such "small producer certificates" in October 1972 and concluded that plaintiffs would be entitled to a recovery of damages from the period from October 1972 through December 1975. The trial court then determined that, because W. E. Hall, Jr. amended his contract with defendant on May 25, 1969, and deleted the favored nations clause from his contract, he had no claim against defendant under the favored nations clause subsequent to May 25, 1969, and would be entitled to no recovery of damages.

The court of appeal affirmed the trial court, holding that defendant had breached the favored nations clause of its contract with plaintiffs and that plaintiffs were entitled to damages measured by the difference between the price paid by defendant to the United States government and the price paid to plaintiffs (after applying adjustments for pertinent factors) only for the period from October 1, 1972 through December 31, 1975.[2] In addition, the court of appeal held that W. E. Hall, Jr. had waived any claim for damages against defendant for the period subsequent to May 25, 1969, by entering into an amended contract with defendant on that date which deleted the favored nations clause from his contract.[3]

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[2] The court of appeal found that the calculations used by the trial judge to determine the amount of damages for the period from October 1, 1972 through December 31, 1975 were based on plaintiffs' calculations representing the entire period of the breach (September 1961 through December 31, 1975). The appellate court thus ordered the case remanded for a new trial restricted to the assessment of damages.

[3] 359 So. 2d 255 (La. App. 2d Cir. 1978).

We denied defendant's application for a writ to review the correctness of the court of appeal's decision.[4] However, on application of plaintiffs, we granted a writ limited to a consideration of whether the court of appeal was correct in denying an award of damages to plaintiffs for the period of defendant's breach prior to October 1972 and whether it was correct in holding that W. E. Hall, Jr. "waived" any claim for damages against defendant by entering into an amended contract on May 25, 1969, which deleted the favored nations clause from his contract.[5]

We note, at the outset, that this controversy involves plaintiffs' claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonablenes of the price, nor any attempt to adjudicate as proper rate, a defendant argues. Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United

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[4] 362 So. 2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. Jordan v. Travelers Insurance Company, 257 La. 995, 245 So. 2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us.

[5] 362 So. 2d 798 (La. 1978).

Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter paricularly within the purview of our state law and state courts.

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). The first issue presented for our resolution is a determination of whether plaintiffs are entitled to a recovery of the difference between such prices for the entire period of defendant's breach of the contract (September 1961 through December 31, 1975) or whether plaintiffs are precluded from a recovery of damages representing the period prior to October 1972.

Unless the Federal Power Commission otherwise orders, no change shall be made by any natural gas company in any rate received by it for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or contract relating thereto, except after thirty days' notice to the Commission and to the public. 15 U.S.C. § 717 c(a) & (d). Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when such changes will go into effect. *Id.* (d). A "small producer" (as defined by the Commission's regulations) may obtain a "small producer certificate" exempting it from the requirement of having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the Commission. *See* 18 C.F.R. § 157.40. Several of the plaintiffs obtained "small

producer certificates" in October 1972, and the certificates issued to those parties were made effective as to all plaintiffs by order of the Commission. It is not disputed by the parties before us that the only rate schedule ever filed by plaintiffs with the Commission was the original gas purchase contract entered into on January 11, 1952. The trial court and court of appeal denied plaintiffs an award of damages arising from defendant's breach of contract for the period of time (*i.e.*, prior to October 1972) during which plaintiffs were required to file new rate schedules with the Commission reflecting their entitlement under the contract, to a higher price for their natural gas sold to defendant.

La. Civ. Code art. 2040 provides:

> The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it.

It is difficult to attach a precise meaning to the rule as it is literally set forth in the text of article 2040. This court, however, has long recognized that the English translation of this provision from the French articles as written in the Louisiana Civil Codes of 1825 (article 2035) and 1808 (article 78) is inaccurate and the French text has always prevailed in decisions of this court. *See* George W. Garig Transfer v. Harris, 226 La. 117, 75 So. 2d 28 (1954); Southport Mill v. Friedrichs, 171 La. 786, 132 So. 346 (1931); Morrison v. Minton, 163 La. 1065, 113 So. 456 (1927); Walls v. Smith, 3 La. 498 (1832) (dissenting opinion). Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. George W. Garig Transfer v. Harris, *supra;* Southport Mill v. Friedrichs, *supra;* Morrison v. Minton, *supra.* This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the nonperformance he has occasioned and that one should not be

able to take advantage of his own wrongful act. *See* Cox v. Department of Highways, 252 La. 22, 209 So. 2d 9 (1968).

The favored nations clause of the contract entered into between plaintiffs and defendant provided that, if defendant purchased from another party seller gas produced from any wells located in the Sligo Gas Field at a higher price than was provided to be paid for plaintiffs' gas, defendant was bound to pay plaintiffs for the gas delivered under their contract at a price increased by an amount equal to the differences between the price provisions of plaintiffs' contract with defendant and the cor rently effective higher price provisions of defendant's contract with the other party seller. To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. To hold otherwise would be in clear contravention of the spirit

and intent of article 2040 and the jurisprudence of this court.[6]

The court of appeal also reasoned that plaintiffs' recovery of damages for the period of defendant's breach prior to October 1972 must be denied because such recovery would necessarily assume that a price increase would have been granted by the Commission. The appellate court concluded that the issue as to whether such approval would have been grantd by the Commission was highly speculative and could not serve as a basis for an award of damages.

Actual damages arising from a breach of contract must be proven; they cannot be merely speculative or conjectual. Brown v. Producers' Oil Co., 134 La. 672, 64 So. 674 (1914). It must appear reasonably certain that the amount of damages rests upon a certain basis. Brown v. Producers' Oil Co., *supra*. Such proof need be only by a preponderance of the evidence; proof by direct or circumstantial evidence is sufficient to constitute a preponderance when, taking the evidence as a whole, such proof shows that the facts or causation sought to be proved is more probable than not. *Cf.* Jordan v. Travelers Insurance Co., 257 La. 995, 245 So. 2d 151 (1971). The sufficiency of proof of damages must be determined in relation to the particular contract at issue and the circumstances surrounding its breach. The question of the certainty of proof of damages becomes a

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[6] We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, "[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition." 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959).

matter for decision in each individual case. Angelloz v. Humble Oil & Refining Co., 196 La. 604, 199 So. 656 (1940).

At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. No evidence was adduced by defendant to establish that Commission approval would have been unlikely. It is our opinion that, taking the evidence as a whole, plaintiffs' proof shows that it was more probable than not that the Commission would have approved a contractually-authorized price increase if the proper filing procedures had been followed. It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[1]

In sum, it is our opinion that plaintiffs are entitled to a recovery of an award of damages measured by the difference between the price defendant paid the United States government and the price defendant paid plaintiffs (after applying various adjustments for pertinent factors) for the entire period of defendant's breach of contract from September 1961 through December 31, 1975.

We must next determine whether W. E. Hall, Jr. waived any claim against defendant for damages arising on and after May 25, 1969, because, on that date, he entered into a contract with defendant wherein he deleted the favored nations clause from the January 11, 1952 agreement. Plaintiffs argue that Hall executed the May 25, 1969 agreement without being informed by defendant that it had activated the favored nations clause of the original agreement and

[1] We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

that defendant misrepresented facts to Hall by informing him that it was paying plaintiffs the highest prices that it was paying any other party sellers for gas produced from the Sligo Field. Plaintiffs contend the May 25, 1969 agreement is void because Hall executed it under an error of fact.

Hall's testimony indicates that in 1969 he possessed an interest in a well (referred to as the Harvey well) under contract to Texas Gas Producing Company (Texas) with the natural gas produced therefrom being sold to Texas. In 1969, the Harvey well was nearly depleted and its pressure was dropping. The pressure on the Texas pipeline serving the Harvey well was too high for such gas to be carried through the pipeline. Hall stated that he was confronted with a situation where he was either going to have to "junk the well," buy a compressor and continue selling to Texas, or obtain a release from Texas and sell to another party with a lower pipeline pressure. After learning that the pressure on defendant's pipeline was lower than that on Texas' pipelines, Hall obtained a release from Texas and negotiated with defendant to take the gas from the Harvey well. An agreement was executed wherein defendant amended the January 11, 1952 gas purchase agreement to also cover Hall's share of the production from the Harvey well. This amendment also deleted the favored nations clause from the January 11, 1952 gas purchase contract. Hall maintained that had he been aware of the fact that defendant was paying a higher price to another party seller in the Sligo Field, he would not have agreed to the deletion of the favored nations clause. Hall also stated that his primary purpose is executing the May 25, 1969 agreement with defendant was to avoid having to purchase and operate a compressor and to be able to continue selling gas from the Harvey well.

Consent of the parties legally given is a requisite to the validity of a contract. La. Civil Code art. 1779. Consent

being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent where it has been produced by error. La. Civil Code art. 1819. An error of fact proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none. La. Civil Code art. 1821. Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. La. Civil Code art. 1823. To have that effect, the error must be in some point, which was a principal cause for making the contract and when there are several this principal cause is called the *motive* and means that consideration without which the contract would not have been made. *Id.* & art. 1825. No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it. La. Civil Code art. 1826. These articles of our Code simply mean that error in the determining motive, or principal cause, of a contract vitiates consent and invalidates the contract. Error as to a subsidiary motive has no effect upon the validity of the contract. Cryer v. M & M Manufacturing Co., Inc., 273 So. 2d 818 (La. 1972); Stack v. Irwin, 246 La. 777, 167 So. 2d 363 (1964); Carpenter v. Skinner, 224 La. 848, 71 So. 2d 133 (1954).

A review of the record convinces us that the error relied upon by plaintiffs to invalidate the May 25, 1969 agreement was not an error in the determining motive, or principal cause, of the agreement. Hall's testimony clearly indicates that the determining motive, or principal cause, of the agreement was his desire to continue selling gas from the Harvey well and to avoid purchasing and operating a compressor for the Harvey well. Any error relating to the

issue as to whether defendant had activated the favored nations clause of the original agreement was only error as to a subsidiary motive and has no effect upon the validity of the May 25, 1969 agreement. Hence, we determine that the May 25, 1969 agreement is not invalid as having been executed by Hall under an error of fact.

We construe plaintiffs' allegations as a contention that the misrepresentations and omissions of defendant invalidated the contract because they constituted fraud.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. La. Civil Code art. 1847. Two elements are essential to constitute legal fraud: the intention to defraud and loss or damage or a strong probability of loss or damage. Buxton v. McKendrick, 223 La. 62, 64 So. 2d 844 (1953). It is well settled that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced. Buxton v. McKendrick, *supra;* Sanders v. Sanders, 222 La. 223, 62 So. 2d 284 (1952).

The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud.[8] Hence,

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[8] In fact, it appears that the deletion of the favored nations clause from the original agreements was an effort by defendant to comply with the orders and regulations of the Federal Power Commission. By Order No. 232 A (25 F.P.C. 609), issued March 31,

the May 25, 1969 agreement executed by W. E. Hall, Jr. cannot be invalidated on the basis of alleged fraudulent conduct of defendant.

In sum, we conclude that the May 25, 1969 amendment to the original gas purchase contract executed by W. E. Hall, Jr. is a valid and enforceable agreement. Since the effect of this agreement was to delete the favored nations clause from the original contract, W. E. Hall, Jr. has no claims for damages against defendant arising on or after May 25, 1969.

DECREE

For the reasons assigned, judgment of the court of appeal is amended to allow plaintiffs (except W. E. Hall, Jr.) an award of damage measured by the difference between the price paid the United States government and the price defendant paid plaintiffs for the entire period of defendant's breach of contract from September 1961 through December 31, 1975; W. E. Hall, Jr.'s recovery of damages against defendant is to be measured for the period of time from September 1961 through May 24, 1969. The case is remanded to the district court for assessment of damages in accordance with the views herein expressed.

1961, the Commission amended its regulations so as to provide that indefinite price escalation clauses (including favored nations clauses) in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission would be inoperative and of no effect at law. By Order No. 242 (27 F.P.C. 339), issued February 8, 1962, the Commission further amended its regulations to provide for the rejection of contracts containing such indefinite escalation clauses. *See* 18 C.F.R. §§ 154.93, 157.14 and 157.25.

SUPREME COURT OF LOUISIANA

No. 62560

FRANK J. HALL ET AL.

Versus

ARKANSAS-LOUISIANA GAS COMPANY

DIXON, *Justice* (concurring)

I fully subscribe to the opinion, but believe C. C. 2040 is applicable only by analogy, and that C. C. 2040 is probably a clarification of the original French text, not an "inaccurate" translation.

APPENDIX J.

(April 9, 1979 Order of Louisiana Supreme Court Denying Arkla's "Application for a Rehearing")

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112
FOR IMMEDIATE NEWS RELEASE

On the 9th day of April, 1979, the following action was taken by the Supreme Court of Louisiana in the case listed below:

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REHEARINGS DENIED:

• • •

62,560 HALL v. ARK-LA. GAS